

BEST AVAILABLE COPY

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INTEREST OF THE AMICI CURIAE

Prince George's County, Maryland operates a municipal solid waste utility to serve a population of approximately 750,000. The utility has facilities for solid waste collection, recycling, yardwaste composting and sanitary landfilling. In 1990, the County enacted a flow control ordinance that required all waste generated in the County to be delivered to the County disposal system. Recyclable materials are directed to the County's materials recovery facility; yard waste must be delivered to a composting facility; and all other waste is disposed of in one of the County's two sanitary landfills. The County has issued \$60 million in revenue bonds that are secured by the

revenues of the utility to finance the cost of solid waste facilities and expects to expend \$140 million in the next 10 years for the capital costs of the utility.

Carroll County, Maryland, with a rural and suburban population of approximately 125,000, operates a sanitary landfill and recycling facilities for County residents. It has recently formed a solid waste task force to study and recommend long-range solid waste disposal and recycling options. Carroll County may use flow control to implement its waste reduction, recycling and disposal policies, ensure system reliability, and facilitate the financing.

The interest of the amici curiae, Prince George's County and Carroll

County, is in the preservation of an important aspect of their police power that enables local governments to manage the ever-growing stream of solid waste. When private sector solutions falter or fail, citizens turn to their local governments to protect human health and the environment from the dangers posed by solid waste. The invalidation of flow control legislation would impede local governments across the country from implementing sound solid waste policies at a time when solid waste solutions have become more complicated and expensive.

Prince George's County's system is a paradigmatic example of how flow control can be used to implement national solid waste policy. In this brief, the Prince George's County solid

waste utility will be described in detail and analyzed under dormant Commerce Clause principles. Hereafter, Prince George's County will be referred to as the "County."

II.

SUMMARY OF ARGUMENT

The County's solid waste disposal policy is implemented through its solid waste utility and an integrated solid waste management system. The County's policy resulted from a balancing of environmental, public health, and cost considerations and not merely an identification of the least expensive capacity available on the interstate market at any particular moment. The integrated solid waste management system, on which the County's solid waste plans are based, contains a

hierarchy for solid waste solutions. It requires that waste generation be curbed and that the different components of waste stream must be matched with the most appropriate recycling, composting or disposal facility. The County's municipal utility provides for programs for waste reduction and for the recycling of approximately 35% of the waste stream by 1999; facilities for the composting of certain wastes; and the operation of two sanitary landfills.

The County's flow control ordinance requires that all solid waste generated within the County's borders be delivered to a designated County facility, where the County then controls how the waste will be disposed of and what inter- and intrastate resources and expertise will be brought to bear to do so.

Flow control is a key element in the success of the County's solid waste disposal utility. It connects the solid waste generators with the utility. Required use of the utility through flow control serves four basic ends. First and foremost, it gets the solid waste to the County's system where each component of the waste stream can be matched with the right recycling or disposal facility. Second, flow control allows the County to create economic disincentives for waste generation and economic incentives for recycling and composting through utility pricing. Third, flow control assures that the system costs are shared equitably; generators cannot take advantage of lower costs of certain components of the system, such as recycling facilities

which are highly subsidized, and go outside the system for others. Fourth, it provides a reliable revenue source which the County uses to build the facilities and implement programs that are necessary to protect the public health and the environment.

The County enacted flow control legislation because it is, on balance, the most effective and least restrictive means available to the County to get the solid waste to its municipal utility. Flow control is simple and fair. Waste is weighed as it is delivered to the County system and per-ton charges (tipping fees) are imposed on the hauler. This system creates disincentives for waste generation. At the same time, flow control leaves the private collection system in place and

even enhances competition within it. One alternative to flow control, County collection of all garbage generated within its borders, would preempt private sector collection altogether. The County can, of course, send its own collectors to its own disposal system; flow control accomplishes the same result. The County concluded that, because commercial generators have varying demands, collection of commercial solid waste is well served by private enterprise.

Another alternative to flow control is to accept waste without any payment and then to fund the system through taxes or solid waste assessments. This is known as "economic flow control," and its legality is uncontested. Economic flow control and flow control

legislation have the same effect: both bring garbage to the County system, and displace private disposal alternatives, which cannot compete with "free" service offered by the municipal utility. The County chose regulatory flow control over economic flow control because ad valorem taxes bear no relationship to the volume of garbage generated and thus cannot serve as a disincentive to the generation of garbage. In addition, the County has limits on its taxing powers and a policy of operating its utility through self-supporting enterprise funds. Special solid waste assessments would require sophisticated utility cost accounting to develop supportable fee schedules for many different classes of residential and commercial waste generators.

Flow control legislation is motivated, not by economic protectionism, but by environmental responsibility, a concern for public health, and the need to ensure the availability of reliable disposal capacity. For the County, there is no profit in garbage. On the contrary, solid waste facilities bring with them only expense, liability and excruciating political decisions. (Indeed, it is hard to imagine a more difficult local political decision than siting a landfill.) Local governments would dismantle their disposal systems if the private sector could make garbage disappear without harm to the environment or the possibility of its return on a barge.

This legislation does not favor local interests at the expense of out-of-state interests. By creating a utility and enacting flow control, the citizens of the County, through their elected representatives, have delegated to the County utility the exclusive right to purchase all recycling and disposal services on their behalf. Far from isolating itself from the national economy, the County utility expends millions of dollars annually for goods and services from the national economy each year and returns thousands of tons of recyclable materials to national markets. The County has not turned inward, favoring local private interests, but has turned outward to embrace the technology and expertise available from national corporations.

To suggest -- as the Petitioners do -- that garbage is a valuable natural resource that the County is hoarding in favor of parochial interests evidences a serious misunderstanding of the burdens that the County has undertaken by mandating that garbage flow to its integrated solid waste management system and not to its "natural" place of repose, the cheapest disposal facility. The citizens of the County, who are also the generators of its garbage, have determined to confront the problem of solid waste generation and have eschewed the simple solution of letting the solid waste disappear into commerce where it is out of sight and out of mind. They have determined to shoulder the economic costs of responsible solid waste management. Their will to do so is

embodied in their solid waste utility and in the flow control legislation which compels each citizen to live up to that responsibility.

In short, the County's municipal utility does not discriminate against interstate business interests in either purpose or effect; it treats inter- and intrastate interests evenhandedly. Further, while flow control does impact interstate business, that impact does not far exceed the local benefits derived from imposing it.

III ARGUMENT

A.

The Regulatory Environment In Which The County's Solid Waste Disposal Utility Operates

Local governments bear the ultimate responsibility for solid waste disposal. They are charged with the nondelegable responsibility of

preserving the public health and the environment. In the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq., Congress deferred to state and local governments on solid waste matters, stating that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies...." 42 U.S.C. §6901(a)(4).

In 1988, the United States Environmental Protection Agency ("EPA") convened a Municipal Solid Waste Task Force that recommended a four-tier solid waste management hierarchy of waste reduction, waste recycling, waste combustion and sanitary landfilling. U.S. Environmental Protection Agency, The Solid Waste Dilemma, An Agenda to

Action 16 (1989). EPA has recognized that this hierarchy is best implemented through local government which can "custom design its integrated waste management system to emphasize certain management practices, consistent with the community's demography and waste stream characteristics." Id. at 2. The report of the Task Force states: "[I]ntegrated waste management systems [should be used] to solve municipal solid waste generation and management problems at the local, regional, and national levels. In this holistic approach, systems are designed so that some or all of the four waste management options (source reduction, recycling, combustion, and landfills) are used as a complement to one another to safely and efficiently manage municipal solid

waste. . . . A key element of integrated waste management is the hierarchy, which favors source reduction (including reuse) [followed by recycling, which] is the preferred waste management option to further reduce potential risks to human health and the environment, divert wastes from landfills and combustors, conserve energy, and slow the depletion of nonrenewable natural resources. . . . Integrated waste management can and should be implemented at a local level to the extent practical, and is a useful conceptual tool for making management decisions." U.S. Environmental Protection Agency, The Solid Waste Dilemma: An Agenda for Action 2-3 (1989).

In its report, EPA lamented the

very problem flow control seeks to remedy: waste flight. It stated: "the incentive to build new, environmentally sound facilities and adopt better management practices may not exist in some areas because of the current practice of 'waste flight,' in which waste is shipped by truck or rail across state and county lines to areas with available capacity." *Id.* at 14. While waste flight may be good for commerce, it promotes an environmental race-to-the-bottom, in which cheap tipping fees are the only consideration.

In Maryland, each county must have a comprehensive solid waste management plan approved by the State Department of the Environment ("MDE"). Md. Envir. Code Ann. §§9-501 to 9-521 (1987 & Supp.

1992). The county plan must address the needs for the entire county, including all towns, municipal corporations and sanitary districts for a 10-year period and describe the solid waste disposal systems, solid waste acceptance facilities and the systematic collection and disposal of solid waste by public or private entities.

Pursuant to State law, the County has adopted a plan, which describes in detail its comprehensive and integrated solid waste disposal utility. In support of its ten-year plan, the County enacted § 21 of the Prince George's County Code which provides in pertinent part:

The Director of Environmental Resources may order that all persons dispose of solid waste solely at any of the approved solid waste acceptance facilities. Any such order may specify the type,

quantity and location of solid waste to be disposed of at solid waste acceptance facilities and such other limitations as the Director may determine.

Regulations promulgated in 1991 pursuant to this ordinance designate the County's two landfills as the approved solid waste acceptance facilities.

B.

The County's Integrated Solid Waste Disposal Utility

The County, like many local governments, has chosen to create a solid waste disposal utility to ensure that: (1) waste generated in the County is managed in a manner consistent with the County policy goals of waste reduction, recycling, composting and sanitary landfilling; (2) the costs of waste management are equitably allocated; (3) the utility's pricing can assist with waste management by creating

economic incentives for waste reduction and recycling; and (4) revenues are adequate to pay for the facilities and programs that are necessary to protect public health and the environment. The courts in this country, including this Court, have consistently upheld the imposition of municipal utilities to provide public services (such as sewer, water, electricity, and solid waste disposal) on an exclusive basis. The County has concluded that flow control is the most effective and least restrictive means of imposing its solid waste disposal utility.

1.

The Utility

The County's disposal system consists of waste reduction programs, recycling programs, composting

facilities and two landfills. The first landfill, the Brown Station Road Landfill, is owned and operated by the County to serve its southern portions, a service area of approximately 270 square miles with a population of approximately 352,000, which generates approximately 300,000 tons of solid waste annually. Over the next ten years, the County expects to expend approximately \$69 million to cap completed portions of this landfill, to construct additional cells to expand the leachate collection and treatment systems and to construct wetlands mitigation areas required by the U.S. Army Corps of Engineers permits. The County operates a methane recovery system at the Brown Station Landfill which generates electricity that is sold to Potomac Electric Power Company.

Maryland requires the County to have a recycling plan providing for at least a 20% reduction in the waste stream by January, 1994. Md. Envir. Code Ann. §9-505 (1987 & Supp. 1992). The County adopted recycling legislation and a recycling plan designed to achieve a 35% recycling rate by 1999. The County sponsors a curbside recycling program for 114,000 single family households, which recovers approximately 27,000 tons of recyclable materials including newspapers, glass, metals and plastic. In fiscal 1994, the County expects to expand the program by approximately 40,000 households and add additional recyclable materials. The County expects its recycling programs to cost approximately \$9 million in fiscal year 1994. This cost has been and will

be funded by the tipping fees paid at the County's two landfills.

The County has contracted for the development of a materials recovery facility where recyclable materials (collected by the County, or delivered by municipalities or other County generators) will be processed for marketing. This facility will cost approximately \$12 million and will be built and operated by a private recycling firm under contract with the County.

The County also operates yard waste composting facilities, where in 1992 approximately 12,000 tons of leaves and grass were delivered by County contract collections. These facilities are operated by a Maryland state agency under contract with the County. The

County also operated "drop off" facilities for recyclables which recovered approximately 16,000 tons of recyclables in 1991.

2.
The Governmental Interests
Served by the County's Utility
Imposed Through Flow Control

The flow control ordinance connects County-generated garbage with the County's modern, integrated solid waste utility where the County sends different components of the waste stream to the recycling, composting and disposal facilities that are the most appropriate. Recyclables are sent to recycling facilities and do not end up in landfills. As markets for a particular recyclable material come and go, the County can adjust the flow of material within its system. The County's curbside collection of

recyclables feeds a materials recovery facility. This facility will increase recycling levels and minimize the impact of solid waste disposal on the environment. The facility, however, could not compete in the marketplace with the least expensive alternative available for the disposal of garbage.

The County's utility provides for a fair allocation of the costs of waste disposal. All County businesses and residents pay for the cost of the integrated management system, and the system impacts all economic interests that touch it, including both inter- and intrastate interests. Virtually every affected person or company has room to complain that the utility could be structured in a manner that would better serve that interest's financial

position. Some generators or collectors might prefer to use low cost, out-of-state landfills in the short term, knowing that they can bring their waste home to the reliable County utility when those landfills are no longer available or become more expensive than the County's. There can be no doubt that some residential generators may prefer to have their non-recycled waste taken to low-cost, out-of-state landfills, but still receive the free curbside recycling, which is funded by tipping fee revenues. Some haulers may prefer to use disposal facilities that are owned or controlled by the haulers themselves; they recognize that access to those facilities puts them at a competitive pricing advantage over smaller haulers

that depend upon the spot market or the County utility. The County utility through flow control requires that all of these divergent economic interests use the system and pay their fair share of the allocable costs.

As a municipal utility, the County can charge a tipping fee that provides an economic disincentive to generate solid waste, thereby promoting the County's waste reduction goals. Solid waste management experts and environmental regulators have criticized those systems -- unlike the County's -- that bury disposal costs within a general tax and do not impose disposal costs on those who generate waste. E.g., Maryland Department of the Environment, Maryland Solid Waste Planning Accord 1 (December 18, 1992)

("the only reliable way to reduce waste generation is for those who generate waste to pay for its processing and disposal"). The tipping fee also generates funds to pay for the County's recycling programs; allowing those programs to encourage recycling by offering low cost or free service. Through its utility pricing mechanisms, the County utility has the power to skew behavior in a way that is environmentally beneficial. These pricing mechanisms will not work if generators or haulers can opt out of the utility or select to use only portions of it that are favorably priced.

The expense of sound solid waste management is significant. Over the next 10 years the County estimates that it will make \$140 million of capital

expenditures for these facilities. Tipping fee revenues, if secured by a flow control ordinance, provide a reliable revenue source for the County utility to pay system expenses. In 1990, the County pledged its tipping fees and other system revenues in order to secure revenue bonds, which it issued to finance capital improvements to its system.

3.

Municipal Public Service
Utilities Have Been Consistently
Upheld by the Courts

The County's solid waste utility, imposed through its flow control ordinance, serves the same purpose as the regulatory requirement imposed by municipal sewage utilities that require households to hook-up to the municipal sewer system. It is settled that an

ordinance requiring households to connect to a municipal sewer utility is a valid exercise of the police power. See, e.g., Rupp v. Grantsville City, 610 P.2d 338, (Utah 1980); Village of Peck v. Hoist, 396 N.W. 2d 536, (Mich. Ct. App. 1986). Further, a municipal utility may require connection to sewer services, even though it employs private contractors in the operation of the sewer utility. Rupp v. Grantsville City, 610 P. 2d at 341 ("while the operation of the utility is a proprietary activity, the power to compel connection with the sewer system is a governmental exercise of the State police power"). Local ordinances compelling residents to connect to a municipal utility are upheld on a two-pronged rationale: first, the

connection requirement flows from local government's traditional police power to protect public health and safety, and second, the local government has a legitimate interest in assuring the economic viability of the utility.

In California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 318 (1905), this Court upheld the validity of a San Francisco ordinance compelling all garbage within the city and county limits of San Francisco to be delivered to a designated facility for incineration pursuant to an exclusive fifty-year franchise. The franchisee brought suit against a rival Colorado corporation and various garbage collectors who continued to collect garbage designated for disposal at plaintiff's facility and haul it to San

Mateo County for disposal. The Court rejected defendants' takings and due process arguments and held that the ordinance constituted a valid exercise of the police power. The Court observed that "it may be taken as firmly established in the jurisprudence of this court that the states possess . . . the power to prescribe such regulations as may be reasonable, necessary and appropriate for the protection of the public health and comfort; and that no person has an absolute right to be at all times and in all circumstances wholly freed from restraint." Id. at 317. The Court further noted that "[m]any of the questions involved in municipal sanitation have proved difficult of solution. There is no mode of disposing of garbage and refuse

matter, as found in cities and dense populations, which is universally followed." Id. at 320.

Likewise, in Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), the Sixth Circuit noted that:

Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. Ordinances regulating garbage collection and disposal are rationally related to a matter of legitimate local concern. Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. [Citations omitted.] If any area of the law can be said to be well settled, this is one. Id. at 1192.

A multitude of cases reaffirm this basic proposition. See McQuillin, Municipal Corporations, §§24.242, 24.245 (3d. ed.

1986). For example, in Matula v. Superior Court, 146 Cal. App. 93, 104, 303 P.2d 871, 878 (1957), the California Court of Appeals stated: "Whatever powers a city possesses to remove garbage and refuse are predicated upon the assumption that a failure in this respect would result in a menace and danger to the people of the whole state, and the authority or power to prevent such endangerment stems from the police power of the state." Accord, G. Fruge Junk Company v. City of Oakland, 637 F.Supp. 422 (N.D. Cal. 1986) (upholding exclusive solid waste franchise ordinances against challenges by a solid waste hauler and recycler who claimed that the exclusive franchise was invalid on equal protection, due process and antitrust grounds); Stephens v. Board of

County Commissioners of Okaloosa County, 278 So.2d 269 (Fla. 1973) (upholding against due process challenges a special law authorizing the board of county commissioners to grant franchises for garbage services, set rates and otherwise regulate solid waste collection and disposal based on the police power to protect public health); Tigard v. Werner, 515 P.2d 934 (Or. App. 1973) (sustaining an exclusive waste collection franchise against challenges that an enabling ordinance that forbade anyone from "unlawfully collecting and hauling garbage and waste materials of another" deprived the rival collector of property without due process); City of Bowling Green v. Davis, 230 S.W.2d 909 (Ky. 1950) (holding that an exclusive franchise for garbage collection was

valid because such arrangements were implicitly authorized by the state when it delegated to the city discretion in caring for the health of its inhabitants).

The courts have also held that a municipality may grant an exclusive right to provide electricity to its residents. See, e.g. Frier v. City of Douglas, 213 S.E.2d 607 (Ga. 1975) (holding that municipalities may preempt other electric suppliers and may even compel customers who wish to terminate service in favor of another supplier to continue to use the town's service); LeBlanc v. City of Plaquemine, 448 So.2d 699 (La Ct. App. 1984); State of North Carolina ex re. Utilities Comm'n. v. Va. Elect. and Power Co., 311 S.E.2d 586 (N.C. 1984) (holding that town had

exclusive right to continue providing electric service); K.C. Elect. Ass'n v. Public Utilities Comm'n, 550 P.2d 871 (Colo. 1976). Further, courts have ruled that connection to a municipal utility may be required to ensure that there are sufficient revenues to ensure the payment of bonds issued to construct and operate the utility. See, e.g., Hodge v. Stout, 377 F. Supp.131, 135 (E.D. Tenn. 1974); City of Sikeston v. Sisson, 249 S.W.2d 345 (Mo. 1952).

4.

Flow Control is the Most
Effective and Least
Restrictive Means of Imposing
the County's Utility

The County could have captured flow of solid waste for the County systems, through the displacement of private collection systems, either by extending the County collection system or

establishing an exclusive franchise for waste collection in the County with a requirement that all waste be delivered to the utility. However, the flow control measure adopted by the County was a less restrictive alternative. The County decided not to interfere with the existing collection practices for commercially-generated solid waste and residential waste generated outside of the County collection districts. The extension of County collection to the commercial sector would have disrupted the collection arrangements established between County businesses and their private haulers. These arrangements are more varied than are residential arrangements and are tailored to meet a wide variety of businesses and their solid waste generation and disposal needs.

The flow control legislation also protects those solid waste collectors who are not affiliated with companies that own landfill or incinerators from being eliminated from the marketplace, and enhances competition among the solid waste collection companies serving the County.

The County's other alternative for assuring that the solid waste is delivered to the County system is the offering of free or below-market service. To do this it would have to raise funds to pay for system expenses from taxes or solid waste assessments. It could then eliminate or discount the tipping fee, and garbage from the entire County would flow to the system. This would do nothing to reduce waste generation. Moreover, one source of

County funding, property taxes, bear no relationship to solid waste generation. To allocate the County's limited taxing powers to this purpose would impair other County functions and conflict with the County's policy of generating its solid waste utility on a self-supporting basis. The other funding source, a solid waste assessment, is difficult to impose and administer because it requires sophisticated cost accounting to develop supportable fee schedules for many different classes of waste generators.

C.

A Brief Review Of Dormant Commerce
Clause Analysis

In Pike v. Bruce Church, 397 U.S. 137, 142 (1970), this Court articulated the rules governing the constitutionality of state regulation

challenged under the dormant Commerce Clause:

[W]here the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

If the purpose of state regulation is "simple economic protectionism," that is, to favor local economic interests over interstate interests, the regulation violates the Commerce Clause. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Further, this Court has ruled that "the evil of protectionism can reside in legislative means as well as legislative ends." Philadelphia v. New Jersey, 437 U.S. at

626. Thus, if the effect of state regulation is to discriminate against interstate economic interests in favor of local interests, it is invalid. *Id.* Conversely, if state regulation treats interstate and intrastate commerce evenhandedly to accomplish legitimate local goals and affects interstate economic interests only incidentally, this Court will uphold the regulation unless the burden on interstate economic interests is "clearly excessive" in relation to the local benefits to be achieved. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The burden is on the party challenging a state law on grounds that it violates the dormant Commerce Clause to establish that the law discriminates against interstate economic interests in either purpose or effect.

D.

The County's Solid Waste Utility,
Imposed Through Flow Control,
Regulates Interstate And
Intrastate Economic Interests
Evenhandedly

In Philadelphia v. New Jersey, 437 U.S. at 622, this Court observed that solid waste can constitute an article of interstate commerce. Here, the Petitioners seize on this observation and contend that the flow control regulation imposed by the Town of Clarkstown discriminates against interstate commerce because it prohibits the exportation of the solid waste from the Town and thereby "hoards" this article of commerce for the sole benefit of intrastate interests. Petitioner's Brief at 23. In support of this argument, Petitioners rely primarily on the line of cases in which this Court

has ruled that a state law that is enacted for the purpose (or which has the effect) of "hoarding" a valuable natural resource for the exclusive benefit of local economic interests is discriminatory and invalid. Foster Fountain Co. v. Haydel, 278 U.S. 553, 598-600 (1928); Toomer v. Whitsett, 334 U.S. 385, 402 (1948); Takahasi v. Fish & Game Comm'n, 334 U.S. 410, 420-421 (1948); Douglas V. Seacoast Products, Inc., 431 U.S. 265 (1977). This argument, however, inaccurately describes the economic interests that are impacted by flow control regulation.

Garbage does not constitute a valuable natural resource that is bargained for on an interstate market. Rather, the generators of garbage pay, often handsomely, for its removal and

disposal. Thus, flow control does not prohibit the exportation of, or hoard, a natural resource.

The economic effect of flow control is to impose, in favor of a local municipal utility, the exclusive right to decide how solid waste will be managed. The economic interests affected by flow control are those of businesses, both interstate and intrastate, that would, in the absence of the monopoly, profit from the right to make the disposal choices made by the utility. Accordingly, when the actual economic interests impacted by flow control are examined, it is apparent that flow control does not discriminate against out-of-state businesses. Its impact falls evenhandedly on in-state and out-of-state business.

Opponents of flow control contend that flow control offends the dormant Commerce Clause because it precludes out-of-state facilities from competing with the facilities of the municipal utility. Pursuant to its affirmative Commerce Clause power, Congress has affirmatively regulated anti-competitive practices by the enactment of federal antitrust laws. It is settled that municipal flow control ordinances enacted pursuant to a clearly expressed state policy do not violate these antitrust laws. Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), vacated on other grounds, 455 U.S. 931 (1982), on remand, 742 F.2d 949 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

In Parker v. Brown, 317 U.S. 341, 350-51 (1943) this Court upheld a state program restricting agricultural production on grounds that the Sherman Act did not restrain state governmental action, holding that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers from activities directed by its legislature." In City of Lafayette v. Louisiana Power of Light Co., 435 U.S. 389, 414 (1978), the Court held that the state action doctrine does not automatically exempt from antitrust laws all municipalities simply by virtue of their status as governmental entities. Rather, the Court concluded, "the Parker doctrine exempts only anti-competitive conduct engaged in as an act of

government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." In Central Iowa Refuse Systems v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), the Eighth Circuit ruled that the state action doctrine protected the anti-competitive practices of certain municipalities in which they required that all solid waste be disposed of at designated facilities. Accordingly, there can be no doubt that Congress, through an exercise of its Commerce Clause power, intended to permit municipal utilities to engage in anti-competitive practices that are necessary for the provision of essential public services such as solid waste

disposal. The exclusivity of service is an inherent part of municipal service utilities, and it is unreasonable to suppose that the dormant Commerce Clause can be interpreted to destroy the exemption created by Parker v. Brown and its progeny under the same provision of the Constitution.

E.

The Local Benefits Created By Flow
Control Far Outweigh The Incidental
Effects, If Any, On Interstate
Commerce

The burden of solid waste disposal ultimately falls upon local governments, even in an era of increasing privatization of certain solid waste services. This proposition was illustrated in 1987 by the famed "garbage barge," a vessel containing over 3,000 tons of commercial solid waste that left Islip, Long Island in

search of a disposal site. After being turned away from ports in North Carolina, Louisiana, Florida, Mexico, Belize and the Bahamas, the garbage barge returned to Long Island, its point of origin. The journey of the garbage barge illustrates that when private sector solutions fail, local governments are the ones ultimately accountable for waste generated in their jurisdictions. New York's garbage barge is not the only such example. In 1988, a barge carrying 15,000 tons of Philadelphia incinerator ash finally returned to Philadelphia after eighteen months and successive rejections at ports including Haiti, Honduras, Bermuda and Guinea-Bissau. The following year, sixty-one rail cars of Baltimore sewage sludge traveled through the southern portion of our

nation for six weeks in a fruitless search for a disposal site before returning to Baltimore.

By imposing flow control, the County and other local covenants are able to ensure that the waste is disposed of in a manner that furthers the disposal and environmental policies of the local government. It is respectfully submitted that the local interests supporting the imposition of flow control are paramount.

On the other hand, the impact of flow control on interstate commerce is not significant. Interstate business interests are involved in providing services to the County utility at virtually every stage in the solid waste disposal process. Interstate companies collect garbage from residential and

commercial generators, operate one of the County's landfills, are constructing and will operate a new composting facility and provide extensive engineering, planning and consultation services. Thus, the County's utility does not impede interstate commerce, but rather operates as the gateway to the interstate markets for solid waste generated within the County's borders.

Thus, the effect of the County's waste disposal utility on interstate commerce does not far exceed the local interests served by the utility. Because flow control such as that implemented by the County regulates inter- and intrastate commerce evenhandedly, affects interstate-commerce only in an incidental manner and does not impose a burden on

interstate commerce that is clearly excessive in relation to the benefits of the regulation, it does not violate the dormant Commerce Clause.